


STATE OF MINNESOTA  
**OFFICE OF THE ATTORNEY GENERAL**

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TO: ROBERT A. LEACH  
Executive Director  
Board of Medical Practice

DATE: December 15, 2005

FROM: STEPHEN B. MASTEN   
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SUBJECT: **Petition for Rule Making Submitted by Pathologists**

**THIS MEMORANDUM IS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE AND PROTECTED FROM DISCLOSURE. THE EXECUTIVE DIRECTOR MAY WAIVE THE PRIVILEGE, BUT NO WAIVER SHOULD OCCUR WITHOUT EXPRESS WRITTEN PERMISSION. TO PREVENT UNINTENTIONAL WAIVER OF THE PRIVILEGE, COPIES SHOULD BE DISTRIBUTED ONLY TO AGENCY EMPLOYEES WHOSE INPUT IS NECESSARY TO RESOLVE THE ISSUES. FURTHER, NO COPIES SHOULD BE INCLUDED IN ANY FILES WHICH MAY BE REQUESTED BY PRIVATE PARTIES.**

You have forwarded to this Office a petition for rulemaking submitted to the Board of Medical Practice by the Minnesota Society of Pathologists pursuant to Minnesota Statutes section 14.09.

Petitioners assert that it is a widespread practice for primary care physicians to send their patients' tissue specimens to a pathologist for analysis and then bill the patients for the pathologist's services in an amount exceeding that charged by the pathologist and without informing the patients. Petitioners ask the Board to promulgate a rule explicitly prohibiting this "markup" practice. You have asked whether this practice violates the following provisions of the Medical Practice Act: Minn. Stat. § 147.091, subd. 1(g) (unethical conduct); (p) (fee splitting); and (q) (abusive or fraudulent billing practices).

There is no Minnesota case law directly on point. However, the markup practice described by the petitioners may violate all three of the cited provisions.

1. Unethical conduct includes "conduct likely to deceive, defraud, or harm the public." Minn. Stat. § 147.091, subd. 1(g) (2004). When a physician marks up the cost of a service performed by a pathologist, the physician is charging a fee for a service he or she did not perform. As the Petitioners point out, the American Medical Association has stated that charging a markup or commission for services

provided by another is unethical (Petition, p. 3). To the extent the primary care physician is justified in billing for administrative services in connection with the work performed by the pathologist, there are specific billing codes that apply; these are the codes the physician should use, rather than adding onto the fees coded for the pathologist's work. To the extent primary care physicians are billing patients for pathologists' services in excess of the cost associated with those services and not telling the patients they are doing this, they are defrauding and deceiving their patients and/or third party payors.

2. Fee splitting includes "dividing fees with another physician . . . unless the division is in proportion to the services provided . . . and the physician has disclosed the terms of the division." *Id.*, subd. 1(p). This definition contemplates a physician charging a fee and passing part of it back to another physician. The markup practice at issue does not quite fit this definition because it is the primary care physician who adds a premium to the pathologist's bill, passes it onto the patient, and then keeps the increment. However, the end result is the same: the physician is paid part of a fee for doing nothing. Minnesota Rules 5620.0100, addressing fee splitting, states: "The purpose of [the statute prohibiting fee splitting] is to protect consumers against medical-economic arrangements . . . that unnecessarily increase the cost of health care to consumers." Assuming that the primary care physician neither adds value to the process nor informs the patient of the markup, this practice appears to be fee splitting.
3. For the reasons explained above, these markups also appear to be an abusive or fraudulent billing practice under Minnesota Statutes section 147.091, subdivision 1(q). Furthermore, the statute explicitly includes violations of the federal Medicare, Medicaid, and state medical assistance laws within the scope of abusive and fraudulent billing. The petition asserts that Medicare prohibits markups of pathology tests. (Petition, p. 7.)

I understand that you will forward the petition to the Board's public policy committee for consideration. The Board has broad authority to promulgate rules. Minn. Stat. § 147.01, subd. 3. If the public policy committee concludes that this markup practice is a problem that needs to be addressed, promulgation of a rule would be one way to address it. A rule could state explicitly that certain defined markups are prohibited because they are a practice that violates some or all of the statutory provisions discussed above. A rule specifically prohibiting markups would increase the likelihood of prevailing in an action involving this practice.

I also believe that the Board has the authority to take action against a licensee engaging in the practice under the statutory provisions cited above. Note that the Board would have to show how this practice falls under the generally defined behaviors proscribed by the statutes. See *Pietsch v. Minn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303 (Minn. 2004).

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Finally, keep in mind that the Board must provide a "specific and detailed" written response to the petition within 60 days after it is received. Minn. Stat. § 14.09; Minn. R. 1400.2040. The copy of the petition you sent to me indicates it was received by the Board on November 3, 2005. The Board's response is due by January 3, 2006.

Please let me know if you have further questions about this matter.

c: Steve Gunn  
AG: #1526933-v2